IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
GEORGE LUNA	:	NO. 00-600

M E M O R A N D U M

Ludwig, J. April 10, 2002

On April 12, 2001, defendant George Luna was convicted by a jury of one count of conspiracy to possess with intent to distribute cocaine, 21 U.S.C. § 846, and one count of possession with intent to deliver cocaine, 21 U.S.C. § 841. In a separate finding, the jury determined the drug quantity to be more than five kilograms. On January 17, 2002, defendant was sentenced to 210 months of custody, five years of supervised release, and a $5,000 fine. His appeal followed, raising pre-indictment delay, the denial of his motion to suppress evidence, and two sentencing matters.[1]

Suppression Motion Findings of Fact[2]

In early February 1999, DEA agents received information that large loads of drugs were being shipped in tractor-trailers from McAllen, Texas. Between February 3 and

[1]By letter of March 12, 2002, defense counsel, in response to an order, identified these four appellate issues.

[2]Evidence on which these findings are based consisted of the unrebutted testimony of four government witnesses — DEA Special Agent Robert Vesseliza, Pennsylvania State Troopers Thomas Martinez, Stephen Lyles, and Felix Acosta — all of which was found to be substantially credible. A finding to this effect was entered, together with other general findings, at the end of the suppression hearing, when the motion was denied. Trial tr. 4/4/01 at 6-9. No evidence was presented by defendant.

7, 1999, a tractor-trailer was surveilled by federal agents as it traveled from Texas to Pennsylvania and New Jersey and back to Pennsylvania. On February 7, 1999, a DEA agent requested Pennsylvania State Trooper Acosta[3] to attempt to find cause to stop the vehicle and, if possible, obtain a consent to search. At about 5:30 p.m., Trooper Martinez, responding to a radio message, met Acosta at the Valley Forge interchange of the Pennsylvania Turnpike and was given the assignment.

Within minutes, Martinez found and followed the tractor-trailer, which was proceeding west on the turnpike. After observing it drift across the center yellow lines four times, Martinez stopped the vehicle and issued a traffic citation to defendant, who was the driver and sole occupant. Upon the trooper's direction, defendant stepped out of the truck. Observing that defendant's eyes were "bloodshot" and "glassy" and that he "seemed disoriented somewhat," Martinez asked him if he had been drinking. Defendant responded negatively and, with "some trouble," passed two field sobriety tests. Supp. hg. tr. 4/3/01 at 36.

When Martinez questioned defendant if he had drugs or alcohol in the cab of the truck, he responded "No." Supp. hg. tr. 4/2/01 at 113. Martinez also inquired as to where the trip had originated. Defendant said he had driven from Texas to New Jersey to deliver a load of cilantro.[4] However, because the cilantro had rotted, he explained, he was now taking it back to Texas. Soon after, defendant changed his statement and said his destination was not Texas, but Chicago, Illinois. Id. at 111-13, 117.

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[3]Acosta was also a DEA Task Force member.

[4]When Martinez asked to see Luna's commercial trucking log book, Luna said the entries in it were not up to date.

While standing at the rear of the trailer, Martinez queried defendant if there were drugs or alcohol in either the tractor or the trailer. Defendant replied in the negative and told the trooper "if [he] wanted to, [he] could check." Martinez understood "that to mean . . . verbal consent to search his overall truck and trailer"; he asked defendant to sign a written consent form to "make it official." Supp. hg. tr. 4/2/01 at 113-14. Defendant agreed.[5] At the behest of Martinez, Trooper Lyles, who had just arrived, prepared a written "Waiver of Rights and Consent to Search" form giving "equal access and control" over both the tractor and trailer for a "contraband" search. Government's Response to Defendant's Motion to Suppress Physical Evidence, Exhibit A (waiver form). Lyles handed the form to Martinez, who read and explained it to defendant, who thereupon signed it. Defendant turned over his keys to Martinez and helped him open the trailer doors to begin the search. Supp. hg. tr. 4/2/01 at 115-24; supp. hg. tr. 4/3/01 at 69-75.

By this time, it was drizzling and dark and the weather was worsening. At Martinez's request, defendant, accompanied in the cab by Trooper Lyles, moved the tractor-trailer to a toll plaza about 125 yards away. However, there was not enough space to park and search the rig at the toll plaza, so Martinez obtained defendant's permission to have a PennDot operator drive the tractor-trailer to the Bowmansville Barracks, about seven miles away. It was snowing. Defendant rode in the back seat of an "uncaged" police car, handcuffed, as a matter of state police practice. Martinez advised him that he was not under arrest. While at the barracks, during the seven-hour search, defendant was not

[5]The suppression motion asserts that defendant's "verbal" consent to search pertained only to the cab of the truck and that he signed the consent form after the search of the tractor and trailer had been completed at the Bowmansville State Police Barracks. Defendant's Motion to Suppress Physical Evidence at 4. However, these contentions had no evidentiary support and were denied by Troopers Martinez and Lyles. Supp. hg. tr. 4/2/01 at 114-24; supp. hg. tr. 4/3/01 at 70-76.

restrained or in police custody. Eventually, early the next morning, the police found a total of 822 kilograms of cocaine buried in crates located on three of the trailer's twenty cargo pallets. Supp. hg. tr. 4/2/02 at 126-27; supp. hg. tr. 4/3/02 at 2-14, 76-87; 126-30. The total number of crates of cilantro exceeded one thousand. Supp. hg. tr. 4/3/01 at 127.

Trooper Acosta immediately arrested defendant and, on February 9, 1999, filed a state criminal complaint against him. Defendant remained in state custody for twenty months until September, 2000 when the present federal indictment was filed.

I. Pre-indictment delay

On April 3, 2001, defendant's pretrial motion to dismiss based on the twenty-month interval between his state arrest and his federal indictment was denied.[6]

Although our Court of Appeals has not ruled on the issue, at least three appellate courts have decided that the Speedy Trial Act, 18 U.S.C. § 3161(b), is not implicated until a defendant is either taken into federal custody on federal charges or indicted on them. See, e.g., United States v. Thomas, 55 F.3d 144, 148 (4th Cir. 1995) (the Act is triggered upon federal arrest that followed a state charge); United States v. Bede, 974 F.2d 948, 950-51 (8th Cir. 1992) (undisputed rule that a state arrest does not start the Speedy Trial Act's clock). "[R]egardless of the degree of federal involvement in a state investigation and arrest, only a federal arrest initiates the running of the time limitation established by the [Act]." United States v. Blackmon, 874 F.2d 378, 381 (6th Cir. 1989).

Moreover, defendant's Sixth Amendment right to a speedy trial was not violated. Our Court of Appeals has not determined whether a state arrest activates Sixth

[6]Defendant's motion was based on asserted violations of the Speedy Trial Act, the Sixth Amendment speedy trial guarantee, and Fifth Amendment due process rights.

Amendment protections if followed by a federal prosecution.[7] However, regardless of the resolution of that issue, no Sixth Amendment deprivation occurred in this case. The factors to be considered are: 1) length of and 2) reason for the delay; 3) timeliness of the assertion of the right to a speedy trial; and 4) prejudice to defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). Here, a twenty-month period is not inordinate given the complexity of the prosecution,[8] the government's representation that it "conducted additional investigation, procured additional evidence and added conspirators after the defendant's state arrest,"[9] a less-than-clear assertion of speedy trial rights by

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[7]Other Courts of Appeals have taken various approaches. Compare United States v. Cabral, 475 F.2d 715, 718 (1st Cir. 1973) (right attaches at time of state arrest); United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972) (right attaches at time of state arrest if federal indictment "really only gild[s] the charge underlying the initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses"), with United States v. Mejias, 552 F.2d 435, 442-43 (2d Cir. 1977) (rejecting contention that state arrest triggers right when substantially the same offense as the later federal prosecution).

[8]"[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Barker, 407 U.S. at 531, 92 S.Ct. at 2192.

[9]"Closely related to length of delay is the reason the government assigns to justify the delay." Id.; see, e.g., United States v. Mejias, 552 F.2d 435, 443 (2d Cir. 1977) (twenty-month delay permissible under Barker largely because "engendered in order for the federal government to determine the need for, and scope of, charges to be brought, including, necessarily, an assessment of the state proceedings, to complete its investigation, and to obtain and compile evidence"); United States v. Holman, 490 F.Supp. 755, 761-62 (1980) (three-year delay reasonable in part because of "complex conspiracy charge" involved and "no suggestion of intentional or even negligent dilatoriness by the prosecutors").

defendant,[10] and no showing that his defense was impaired.[11] Government's Memorandum In Support of its Response to Defendant's Motion to Dismiss Indictment at 4.

Fifth Amendment due process rights also were not transgressed. To make out such a violation, a "defendant must bear the burden of proving two essential facts: (1) that the government intentionally delayed bringing the indictment in order to gain some advantage over him, and that (2) this intentional delay caused the defendant actual prejudice." United States v. Ismaili, 828 F.2d 153, 167 (3d Cir. 1987) (citing United States v. Marion, 404 U.S. 307, 325, 92 S.Ct. 455, 466, 30 L.Ed.2d 468 (1971)). Defendant offers no evidence of tactical delay. Moreover, the Fifth Amendment contemplates some "investigative delay" even if the defense "might have been somewhat prejudiced by the lapse of time." United States v. Lovasco, 431 U.S. 783, 797, 97 S.Ct. 2044, 2052, 52 L.Ed.2d 752 (1977).

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[10]Defendant contends that "he asserted his speedy trial rights, however in artfully [sic], when he indicated clearly to prior [state] counsel that he was eager to proceed to trial and did not wish to delay in an effort to cooperate with the government or law enforcement." Defendant's Motion to Dismiss Indictment at 6. However, defendant's counsel on his state charges requested continuances of the state trial date so that Luna could cooperate with the government. He testified that he saw defendant sign state and federal proffer letters after he "had an opportunity to go through the substance" of those letters with his client. Supp. Hg. Tr. 4/2/01 at 15-16. About fourteen months after signing the proffer letters, defendant, for reasons that have not been articulated, rejected cooperation.

[11]"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect . . . : (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last . . . ." Barker, 407 U.S. at 532, 92 S.Ct. at 2193. Defendant's assertion that the delay "was intended to induce his cooperation with federal authorities without regard for his interests . . . and to secure the cooperation of others against him," does not show that his *defense* was compromised. Defendant's Motion to Dismiss Indictment at 6. See id. (citing witnesses' loss of memory and disappearance as examples of defense impairment caused by delay).

II. Suppression of evidence

By order entered April 11, 2001, upon hearing, defendant's motion to suppress the search and seizure of the cocaine found in the tractor-trailer was denied.[12] Under Fourth Amendment jurisprudence, a law enforcement officer who observes a traffic violation may stop the motor vehicle. Delaware v. Prouse, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660 (1979); United States v. Velasquez, 885 F.2d 1076, 1081 (3d Cir. 1989). This issue "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him . . . ." Maryland v. Macon, 472 U.S. 463, 470, 105 S. Ct. 2778, 2783, 86 L. Ed. 2d 370 (1985) (quoting Scott v. United States, 436 U.S. 128, 136, 98 S.Ct. 1717, 1722, 56 L.Ed.2d 168 (1978)). Here, the trooper saw the tractor-trailer cross over marked lanes of traffic a number of times, thereby violating the Pennsylvania Vehicle Code, Title 76, § 3309, §1. The initial stop, therefore, was permissible.

During a traffic stop, an officer may interrogate the driver concerning the circumstances of the violation, but not as to unrelated criminal activity. See Berkemer v. McCarty, 468 U.S. 420, 439, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317 (1984). However, upon learning or coming upon facts that create suspicion of additional criminal conduct, the officer may investigate further. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. 3d. 2d 889 (1968). Here, defendant's "bloodshot" and "glassy" eyes, the impression that he "seemed disoriented," had "some trouble" passing sobriety tests, and changed his answer

[12]Defendant also moved to suppress proffer letters signed by him on July 19, 1999. However, credible testimony of defendant's former attorney, John J. Duffy; of Chester County Assistant District Attorney Joseph Carroll; and of DEA agent Robert Vesseliza established that defendant voluntarily signed the letters and knowingly entered into the proffer agreements. Trial tr. 4/4/01 at 8-9.

about his destination, raised a reasonable suspicion of illegal drug or alcohol use or possession.

A voluntary consent to search may be obtained during lawful detention. Florida v. Royer, 460 U.S. 491, 502, 103 S. Ct. 1319, 1326-27, 74 L. Ed. 2d 229 (1983). "[W]hether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973). Voluntariness does not require an officer to explain that there is a right to refuse to consent. Id. at 231-34, 93 S.Ct. at 2049-51. Here, there is no evidence of duress or coercion.[13] Defendant knowingly signed the consent form after he agreed to the search and before he was handcuffed and driven to the State Police Barracks.

III. Sentencing

Given the undisputed quantity of cocaine, defendant's total base offense level was fixed at 38. U.S.S.G. § 2D1.1(c)(1). The total offense level was reduced to 36 after a two-level mitigating role adjustment under § 3B1.2(b).[14] With a criminal history category of II (3 criminal history points), the Guidelines range was 210 to 262 months. Defendant moved for a three or four-level adjustment under § 3B1.2 and for downward departures

[13]Defendant's cooperation in handing over his truck keys and helping open the trailer doors is evidence of voluntariness. See United States v. Kim, 27 F.3d 947, 955 (3d Cir. 1994) (noting defendant's ready cooperation).

[14]Over the government's objection and contrary to the probation office's calculation.

under § 2D1.1 application note 14[15] – "the safety valve" – and § 5K2.0. These motions were denied.

a. Mitigating role adjustment

To receive a mitigating role adjustment under § 3B1.2, a defendant has the burden[16] of proving that his "role in the offense makes him substantially less culpable than the average participant." United States v. Isaza-Zapata, 148 F.3d 236, 238, 240 (3d Cir. 1998). Defendant's relative culpability is determined based on all relevant conduct,[17] including "such factors as the nature of the defendant's relationship to the other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise." Id. at 239. The relevant conduct here is extensive.[18] Unlike defendant, most of the participants in this voluminous drug trafficking conspiracy had roles that involving multiple shipments over several years and regular interaction with other members of the organization.[19] However,

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[15]Defendant eventually conceded that he was not eligible for this two-level reduction because of his prior felony conviction for a crime of violence. Sent. hg. tr. 6/20/01 at 29-30; sent. hg. tr. 1/17/02 at 46.

[16]United States v. Isaza-Zapata, 148 F.3d 236, 240 (3d Cir. 1998).

[17]Relevant conduct "in the case of a jointly undertaken criminal activity . . . [includes] all reasonably foreseeable acts and omissions of others in furtherance of the . . . activity, that occurred during the commission of the offense of conviction, in preparation for the offense, or in the course of attempting to avoid detection or responsibility for that offense." § 1B1.3(a)(1)(B).

[18]Given that defendant was to be paid $50,000 and the size of the shipment involved, it was reasonably foreseeable that he was engaged in a sophisticated and large-scale criminal enterprise. Trial tr. 4/9/01 at 154-55. Accordingly, "relevant conduct" here includes the broad swath of activity carried out "in furtherance of . . ., during . . . [and] in preparation for . . . ." the offenses of conviction. § 1B1.3(a)(1)(B).

[19]The trial testimony of Arturo Arredondo, Bobby Ambriz, and Guadalupe

(continued...)

the magnitude and importance of defendant's single-transaction culpability is too great to permit a four-level minimal role adjustment.[20] Defendant purchased the tractor-trailer expressly for this trip, obtained permits for interstate travel, requested a false bill of lading, and planned his route to avoid detection. Trial tr. 4/9/01 at 154-55, 166, 179. A two-level minor role adjustment is appropriate, at most.

b. Downward departure under § 5K2.0

Defendant moved for a downward departure under § 5K2.0 because his base offense level "severely overstates the seriousness of his conduct"; and he was subjected to "extraordinary confinement" in a purportedly substandard state institution before federal indictment. Defendant's Sentencing Memorandum at 9; defendant's *Pro Se* Motion for Downward Departure at 1.[21]

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[19](...continued)
Garcia, all of whom worked for the criminal organization that arranged defendant's shipment, revealed a large and complex drug importation scheme. Over the four-year period that Arredondo worked as "head of transportation," the organization arranged thirty to fifty shipments of drugs from Mexico to various destinations in the United States and sent three to five million dollars of proceeds back to Mexican "owners." Trial tr. 4/5/01 at 114, 161, 164, 194. The organization had ongoing employment relationships with workers who coordinated shipments, moved drugs from the border to warehouses, supplied "cover" produce to conceal shipments, loaded trucks, and hired drivers. Id. at 193, 199, 200-02. Drivers, such as defendant, were "never" told the amount of drugs they were carrying and were intentionally shielded from knowing the location of warehouses where the trucks were loaded. Trial tr. 4/5/01 at 122, 132.

[20]"It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." § 3B1.2 application note 2 (November 1, 2000).

[21]Filed *pro se*, this motion was argued by defense counsel at the 1/17/02 sentencing hearing.

Defendant, however, did not identify factors or reasons or produce evidence showing that his base offense level overstated the seriousness of his conduct relative to "the 'heartland' cases covered by the guidelines."[22] § 5K2.0.

As to a downward departure because of the conditions of presentence detention, a defendant has the burden of showing that they were "extraordinarily bad"[23] or "exceptionally harsh" and "that the conditions compare unfavorably to those suffered by other inmates." United States v. Pacheco, 67 F.Supp.2d 495, 498 (E.D.Pa. 1999) (citing United States v. Sutton, 973 F.Supp. 488, 492-95 (D.N.J. 1977) (departure appropriate only where conditions represent an unusual hardship "atypical as compared with jails in other jurisdictions")). Defendant has not made out a threshold case of "extraordinarily bad" conditions,[24] so an objectively meaningful comparative evaluation cannot be undertaken.

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[22]Defendant points, in part, to the applicability of a mitigating role adjustment and a downward departure under § 2D1.1 application note 14 (to base offense level 36) as arguments that his base offense level of 38 overstated the seriousness of his conduct. Defendant's Sentencing Memorandum at 9, 11. However, the existence of these provisions suggests that the Sentencing Commission considered instances in which an adjustment to or departure from a base offense level would be appropriate. Defendant's case does not sufficiently fit within those criteria, either separately or in combination – other than as to the minor role adjustment.

[23]United States v. Brown, 95 F.Supp.2d 277, 280 (E.D.Pa. 2000).

[24]A contrary conclusion was reached based on Deputy Warden Ramon Rustin's testimony and the government's proffer of an inspection report for the Chester County Prison, where defendant was housed until his federal indictment. Deputy Warden Rustin's testimony was credited and the proffer was accepted. Sent. hg. tr. 1/17/02 at 39-41.